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## India's New Model Investment Treaty: Fit for Purpose?

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In December 2015, India released a new model bilateral investment treaty. The development of such models typically serves four purposes: facilitating negotiations with partner states; constituting state practice which may contribute to the formation of customary international law; providing interpretive guidance to tribunals; and promoting uniformity in international law. However, despite some innovative provisions, the new Indian model displays a lack of drafting clarity in some respects, and a degree of redundancy in other respects. These deficiencies make it doubtful whether the model can achieve any of its purposes. India appears to remain committed to (a reformed version of) the investment treaty system, not least on behalf of the burgeoning numbers of outward Indian investors. The model's failings are therefore all the more acute, and pose challenges for India's ambitions to play a greater role in the system, while also potentially representing a missed opportunity for India's broader role in the 'Asian century'.

Keywords: bilateral investment treaties, arbitration, general international law, counterclaims, expropriation, exhaustion of local remedies, frivolous claims, domestic law, treaty conflict, ICSID Convention

### 1. Introduction

Since concluding its first bilateral investment treaty (BIT) with the United Kingdom in 1994, India has established one of the largest BIT networks of all developing countries.<sup>1</sup> India's BITs were originally based on a 1993 model, developed from a 1967 OECD

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<sup>1</sup> P Ranjan, 'India and Bilateral Investment Treaties – A Changing Landscape' (2014) 29 ICSID Rev 419, 421.

Draft Convention.<sup>2</sup> The 1993 model, and the 1994 UK-India BIT, in turn served as a basis for the creation of a 2003 model investment treaty.<sup>3</sup> Until 2011, when it was held liable by an arbitral tribunal for breaching the Australia-India BIT, India paid little attention to these treaties. Although the compensation awarded to the investor, White Industries Australia Ltd, was relatively small (around \$8 million),<sup>4</sup> the fact of losing the case appeared to wake India up to the importance of its BIT network.

Consequently, in 2013, India halted all further negotiations of new BITs,<sup>5</sup> and proceeded to review its 2003 model treaty, producing a new draft model in March 2015 (Draft Model). Following public consultations and a report by the Law Commission of India (LCI),<sup>6</sup> the final model was released in December 2015 (Model).<sup>7</sup> Throughout 2016, India then sent unilateral notices of termination to 58 of its 83 BIT partner states,<sup>8</sup> putting terminations into effect from November 2016 onwards.<sup>9</sup>

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<sup>2</sup> Department of Economic Affairs, Ministry of Finance, Government of India, 'Transforming the International Investment Agreement Regime: The Indian Experience' (Presentation at UNCTAD Expert Meeting, 25 February 2015) <[unctad-worldinvestmentforum.org/wp-content/uploads/2015/03/India\\_side-event-Wednesday\\_model-agreements.pdf](http://unctad-worldinvestmentforum.org/wp-content/uploads/2015/03/India_side-event-Wednesday_model-agreements.pdf)>.

<sup>3</sup> P Ranjan, 'Investment Protection and Host State's Right to Regulate in Indian Model Bilateral Investment Treaty 2016: Lessons for Asian Countries' <[ssrn.com/abstract=2888731](http://ssrn.com/abstract=2888731)> 2.

<sup>4</sup> *White Industries Australia Ltd v India* (UNCITRAL), Final Award, 30 November 2011 [16.1.1].

<sup>5</sup> Ranjan (n 1) 421.

<sup>6</sup> LCI, 'Report No. 260: Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty' (27 August 2015) <[lawcommissionofindia.nic.in/reports/Report260.pdf](http://lawcommissionofindia.nic.in/reports/Report260.pdf)> (Report 260).

<sup>7</sup> Available at <[finmin.nic.in/reports/ModelTextIndia\\_BIT.pdf](http://finmin.nic.in/reports/ModelTextIndia_BIT.pdf)>.

<sup>8</sup> Ministry of Commerce & Industry, Government of India, 'Bilateral Investment Treaties' (25 July 2016) <[www.dipp.gov.in/English/questions/25072016/lu1290.pdf](http://www.dipp.gov.in/English/questions/25072016/lu1290.pdf)>.

<sup>9</sup> The exact date of termination for each BIT varies depending on the notice period required under that BIT and the date of notification given by India. The Netherlands-India BIT terminated on 30 November 2016, for instance, while the Australia-India BIT terminated on 22 March 2017.

Despite the public consultations, little formal explanatory information on the Model is available. Some indication of the intended meaning or effect of the Model's particular provisions might be gauged by comparing it to the Draft Model, in conjunction with the LCI's Report 260: where a suggestion in the report has been adopted, the government most likely also agreed with the report's reasons for the suggestion. Other indications of intentions can be gleaned from public statements made by the Finance Ministry.<sup>10</sup> However, beyond this, observers are left only with the Model text itself.

This Model text has been assessed in the literature to date from various perspectives, most notably including whether it provides sufficient protection to foreign investors when balanced against the host state's interests.<sup>11</sup> The Model's removal of the "umbrella" clause and the "most-favoured-nation" (MFN) clause, for instance, are important elements in such an assessment. This article, meanwhile, pursues a different assessment, starting with the reasons why states develop such model treaties.

Model BITs typically serve several purposes.<sup>12</sup> First, they facilitate negotiations with partner states on an actual agreement, increasing efficiency and reducing costs for

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<sup>10</sup> See, eg, Department of Economic Affairs (n 2) (discussing the Draft Model); South Centre, 'Approaches by Developing Countries to Reforming Investment Rules; South-South Dialogue and Cooperation', 20 July 2016, 8 (remarks by Indian official CC Sarkar).

<sup>11</sup> See, eg, G Hanessian and K Duggal, 'The Final 2015 Indian Model BIT: Is This the Change the World Wishes to See?' (2017) 32 ICSID Rev 216; Ranjan (n 3); P Ranjan and P Anand, 'The 2016 Indian Model Bilateral Investment Treaty: A Critical Deconstruction' <[ssrn.com/abstract=2946041](http://ssrn.com/abstract=2946041)>; M Thadikkaran, 'Model Text for the Indian Bilateral Investment Treaty: An Analysis' (2015) 8 NUJS L Rev 31; and the contributions in K Singh and B Ilge (eds), *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices* (Both Ends/Madhyam/SOMO 2016).

<sup>12</sup> C Brown (ed), *Commentaries on Selected Model Investment Treaties* (OUP 2013) 2, 11; S Schill, *The Multilateralization of International Investment Law* (CUP 2009) 89–98; P

each side. According to the Indian government, for instance, the Model is intended to serve as the basis for negotiations on new investment treaties to replace those terminated throughout 2016.<sup>13</sup> (India is not unique in developing a model investment treaty to frame discussions with partners; many other states have done so.)<sup>14</sup> Second, as formal and considered statements of a policy position, model BITs also represent an important instance of state practice on foreign investment protection, which over time may contribute to the development of customary international law (CIL) in the area. Third, model BITs have served as useful interpretive guides for tribunals considering the provisions of an actual BIT concluded by the model state.<sup>15</sup> Fourth, models promote uniformity in the rules governing investment between the model proponent and its partners. The United States, for instance, has been highly successful at spreading its vision of global investment rules through treaties concluded with several states on the basis of its 1994, 2004 and 2012 model BITs.<sup>16</sup> Provisions found in US models have even been used by US partner states in treaties signed by them with third states.<sup>17</sup>

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Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (CUP 2016) 251–57.

<sup>13</sup> Press Information Bureau, Government of India, ‘Model Text for the Indian Bilateral Investment Treaty’ (16 December 2015) <[pib.nic.in/newsite/PrintRelease.aspx?relid=133411](http://pib.nic.in/newsite/PrintRelease.aspx?relid=133411)>.

<sup>14</sup> Brown (n 12).

<sup>15</sup> Dumberry (n 12) 253–57.

<sup>16</sup> W Alschner and D Skougarevskiy, ‘Mapping the Universe of International Investment Agreements’ (2016) 19 JIEL 561; W Alschner, ‘The New Gold Standard? Empirically Situating the Trans-Pacific Partnership in the Investment Treaty Universe’ (2016) 17 JWIT 339.

<sup>17</sup> See, eg, the diffusion of the interpretive annex on expropriation, moving from US treaties to many others including India’s agreements with Singapore and China: S Spears, ‘Making Way for the Public Interest in International Investment Agreements’ in C Brown and K Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP 2011) 278.

But whether a model BIT effectively contributes to these purposes depends on several factors, including the clarity of the model's provisions and their consistency with and relationship to the state's pre-existing obligations in treaty and custom. This article aims to assess the extent to which the Indian Model BIT fulfils these general purposes of a model investment treaty. In contrast to other commentators, then, the article discusses features of the Model that affect this assessment. Section 2 reviews novel provisions in the Model through which India appears to adopt a deliberate new path, in an effort to shape the global investment treaty regime. The Model's approach to counterclaims is the focus of this section. Section 3, however, considers other provisions of the Model whose intended effect is less clear, in the absence of any additional clarificatory text or explanatory information. These provisions relate to central issues of both substance and procedure: expropriation, the definition of investor and investment, exhaustion of local remedies, and dismissal of frivolous claims. Section 4 studies four further areas of the Model, where – when understood against a background of India's obligations in treaty and CIL – its provisions appear to do nothing at all, and are rendered largely redundant. Section 5 concludes.

## **2. Innovations in the Model: *De Facto* Counterclaims**

In several areas, the Model consciously departs from the well-known clauses of a typical investment treaty. Some changes, such as on MFN or arbitrator ethics, appear to be directly inspired by the outcomes of recent arbitrations involving India.<sup>18</sup> Other new

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<sup>18</sup> The MFN clause was at the heart of India's loss in the *White Industries* case: see *White Industries* (n 4) [11.2]. Similarly, the arbitrator conflict provisions may have been drafted in response to India's experiences with arbitrator challenges in the *CC/Devas* case: *CC/Devas (Mauritius) Ltd v India* (PCA Case No 2013-09), Decision on the Respondent's

provisions relate to transparency and publication of laws,<sup>19</sup> but are not justiciable,<sup>20</sup> meaning that their practical impact is likely to be minimal.

A more interesting departure from previous treaty practice is found in a number of Model provisions relating (albeit indirectly) to the issue of counterclaims by states against investors. One of the major criticisms of investment treaties has been their asymmetrical nature: imposing obligations on states and granting rights to investors, but not the reverse.<sup>21</sup> The Draft Model sought to remedy this by including extensive provisions on investor obligations, and counterclaims by states to enforce these obligations.<sup>22</sup> The Draft Model's Articles 9–12 imposed obligations on investors relating to anti-corruption, transparency, taxation, labour law, environmental law and human rights, while Article 14.11(i) permitted the state to claim compensation for breaches of these obligations in an arbitration initiated by the investor.

While the LCI's Report 260 suggested some amendments to the investor obligations, it did not recommend their removal, or any amendment to Article 14.11 on counterclaims. Nevertheless, the Model has removed all binding investor obligations, and no longer makes any express provision for counterclaims by the state. Instead, the Model includes a clause "reaffirm[ing] and recogniz[ing]" that investors must comply

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Challenge to the Hon Marc Lalonde as Presiding Arbitrator and Prof Francisco Orrego Vicuña as Co-Arbitrator, 30 September 2013.

<sup>19</sup> Article 10.

<sup>20</sup> Article 15.1.

<sup>21</sup> A Newcombe and L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer 2009) 64.

<sup>22</sup> These provisions appeared to be directly inspired by the 2005 Model Investment Agreement produced by the International Institute for Sustainable Development (IISD), <[www.iisd.org/pdf/2005/investment\\_model\\_int\\_agreement.pdf](http://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf)>. Compare Articles 9.1 and 9.4 of the Draft Model with Articles 13(A) and (B) of the IISD Model. See also Report 260 (n 6) [4.1.3].

with host state law and must not engage in corrupt activities.<sup>23</sup> A separate clause requires investors to “endeavour to voluntarily incorporate” corporate social responsibility standards into their operations.<sup>24</sup> Neither of these clauses is justiciable under the Model’s revised approach.

Despite removing the counterclaims provisions, the Model contains other provisions that allow issues relevant to counterclaims to be raised.

First, and unlike most other investment treaties,<sup>25</sup> the Model explicitly requires investments to comply with domestic law throughout their operation. Article 1.4 defines “investment” as an enterprise “operated...in accordance with the law of the [host state]”. Debate over an investor’s compliance with the full range of domestic legal obligations is thus likely to form part of a state’s jurisdictional objections, rather than appearing as a counterclaim addressed only after the merits of the investor’s claim. Shifting such arguments to the jurisdictional stage not only gives them greater prominence in the proceedings, but also has the effect of dismissing investors’ claims entirely following a sufficiently serious breach of local law.

Second, the Model includes a footnote that may re-introduce some counterclaims by the back door. When calculating damages, Article 26.3 provides that tribunals “*shall* ... reduce the damages to take into account ... mitigating factors”. In a footnote to this clause, the Model specifies that mitigating factors “*can* include ... any unremedied harm or damage that the investor has caused to the environment or local

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<sup>23</sup> Article 11.

<sup>24</sup> Article 12.

<sup>25</sup> Other treaties only require investments to comply with domestic law at the time of their establishment in the host state. See J Hepburn, ‘In Accordance with *Which* Host State Laws? Restoring the “Defence” of Investor Illegality in Investment Arbitration’ (2014) 5 JIDS 531.



community”. The Model appears to *require* tribunals to consider mitigating factors, but also gives tribunals wide discretion in determining what counts as a mitigating factor. Presumably, this discretion would be primarily guided by parties’ arguments. The state could thus claim that the investor caused environmental harm, and the tribunal would be likely to assess the substance of this claim. Notably, the “environmental harm” mitigating factor in Article 26.3 appears to entail a purely factual inquiry, asking whether any harm exists and whether it was caused by the investor. It does not appear to entail consideration of whether the investor breached any legal obligation in causing the environmental harm. If the investor *has* caused environmental harm, it is likely that this will have breached a domestic legal obligation, meaning that the investment will not have been “operated ... in accordance with the law of the [host state]”, and will not be protected by the treaty at all. This might make the reference to environmental harm in Article 26.3 otiose. However, the footnote’s factual inquiry may still be useful in states that do not have developed domestic regimes of environmental law, and where the investor is under no legal obligation to avoid causing environmental harm. Article 26.3 thus gives tribunals the power to condemn investors for environmental misconduct despite the absence of any legal duty to behave responsibly. In this sense, Article 26.3 serves as a meaningful counterclaims process for states, adding some teeth to the purely hortatory language of provisions such as Article 12 on corporate social responsibility.

Third, Article 26.3’s footnote also includes the mitigating factor of “other relevant considerations regarding the need to balance public interest and the interests of the investor”. Assuming again that any actual illegalities in the investment’s operation will have been addressed at the jurisdictional stage, one such consideration could be the investor’s efforts to comply with the “internationally recognized standards of corporate

social responsibility” acknowledged in Article 12. This could also effectively allow for a counterclaim by the state, albeit only to set-off against any damages owed.

These *de facto* counterclaims provisions appear to be a conscious effort to establish new rules better suited to the nature of contemporary investor-state claims. Article 1.4 on domestic law compliance is effectively a manifestation of the doctrine of “clean hands”, but whether this doctrine actually constitutes part of general international law is contested.<sup>26</sup> Article 1.4 may thus constitute a deliberate divergence from general international law in this investor-state context. Meanwhile, Article 26.3’s direction to consider mitigating factors in calculating damages might be viewed as an exercise of equity, which has a firmer ground as a general principle of law, although rarely applied.<sup>27</sup> In some circumstances,<sup>28</sup> the mitigating factors might also represent instances of the claimant’s contribution to its own injury, recognized as a customary principle limiting reparations.<sup>29</sup> More likely, though, the Model’s provisions on mitigating factors represent an intentional move to establish *lex specialis* principles of reparations that will

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<sup>26</sup> In favour, see eg P Dumberry, ‘State of Confusion: The Doctrine of “Clean Hands” in Investment Arbitration After the *Yukos* Awards’ (2016) 17 JWIT 229. Against, see eg *Yukos Universal Ltd v Russia* (UNCITRAL), PCA Case No AA 228, Final Award, 18 July 2014 [1358]–[1359]. Others conclude that ‘[I]earned opinion is divided’: S Schwebel, ‘Clean Hands, Principle’, *Max Planck Encyclopaedia of Public International Law* (March 2013).

<sup>27</sup> B Sabahi, *Compensation and Restitution in Investor-State Arbitration* (OUP 2011) 186.

<sup>28</sup> Such as, perhaps, where environmental harm triggered the state’s intervention against an investment.

<sup>29</sup> International Law Commission, ‘Articles on Responsibility of States for Internationally Wrongful Acts’ in *Yearbook of the International Law Commission, 2001, Volume II*, UN Doc A/CN.4/SER.A/2001/Add.1, Article 39.

prevail over general international law,<sup>30</sup> again perhaps reflecting the particular investor-state context.<sup>31</sup>

### **3. Textual Silences and Drafting Ambiguity: Model or Muddle?**

Elsewhere in the Model, India has forged other new paths, apparently adopting a novel approach to investment protection with potentially widespread ramifications. However, in these areas of expropriation, the definition of investor and investment, exhaustion of local remedies and dismissal of frivolous claims, a closer analysis reveals that the drafting and the intentions behind it are somewhat confused.

#### ***3.1 Discriminatory expropriation***

The Model's Article 5 makes state expropriation of foreign property subject to three of the usual conditions for lawfulness: a public purpose, compliance with due process of law, and payment of compensation. A fourth condition, non-discrimination, is however omitted. Investment treaties rarely exclude the condition of non-discrimination in their provision on expropriation,<sup>32</sup> particularly since the condition forms part of CIL on expropriation.<sup>33</sup> The omission means that an expropriation will not breach Article 5 even if it is deliberately targeted at investments owned by (for instance) a particular

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<sup>30</sup> *ibid* Article 55.

<sup>31</sup> Writers have questioned whether standard CIL principles on reparations are appropriate for investor-state claims: see, eg, R Goodman and Y Parkhomenko, 'Does the *Chorzow Factory* Standard Apply in Investment Arbitration? A Contextual Reappraisal' (2017) ICSID Rev (forthcoming).

<sup>32</sup> A Reinisch, 'Legality of Expropriations' in A Reinisch (ed), *Standards of Investment Protection* (OUP 2008) 186. None of the model BITs reviewed in Brown (n 12) omits the non-discrimination condition.

<sup>33</sup> Reinisch (n 32).

nationality or racial, religious or ethnic group.<sup>34</sup>

Certainly, the other conditions for lawful expropriation in the Model may offset the failure to include the non-discrimination condition. For instance, although tribunals typically afford a large degree of deference to states in determining which actions fulfil their public purposes,<sup>35</sup> a tribunal could perhaps scrutinise this more closely for measures targeted at a particular racial group. Similarly, discriminatory measures might breach the condition of according due process of law.

Furthermore, provisions in the Model other than on expropriation may capture discriminatory measures. Article 4 guaranteeing national treatment, for instance, will capture measures taken on grounds of foreign nationality. Article 3.1 which outlaws “measures which constitute a violation of customary international law through ... targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief”, will protect investors against discriminatory takings, assuming that such discrimination is in fact prohibited by CIL.<sup>36</sup>

Nevertheless, the failure to include the non-discrimination condition curiously restricts the Model’s scope for expropriation claims, compared to other typical BITs and to CIL. It is unclear whether this divergence is a simple oversight in the Model, or a deliberate omission to be accorded some real meaning. The Model might generally have the admirable aim of preserving “policy space” for legitimate state interests,<sup>37</sup> but it is difficult to imagine why it should preserve space to engage in discriminatory expropriations.

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<sup>34</sup> Thadikkaran (n 11) 38.

<sup>35</sup> UNCTAD, *Expropriation* (UNCTAD/DIAE/IA/2011/7, July 2012) 32.

<sup>36</sup> See the discussion in M Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013) 245–47.

<sup>37</sup> South Centre (n 2).

### ***3.2 Definition of investor and investment***

As widely observed by commentators,<sup>38</sup> the Model takes a new approach to the definition of investment, shifting from the commonly-used asset-based definition to an enterprise-based definition. Under the Model, an investment must be a company registered in the host state and ultimately owned by an individual of home state nationality or by a company registered in the home state and having “substantial business activities” there. Either that individual or that company must normally be the investor-claimant. The Model does allow intermediary “shell” or holding companies (of home state nationality) to bring claims, but requires them to be “directly or indirectly” owned or controlled by a home state national or a company with home state substantial business activities. The inclusion of the word “indirectly” in Article 1.5(b) appears to allow the presence of a third-country company somewhere in the chain of ownership above the investor-claimant. However, to avoid the risk of invocation of the Model’s denial of benefits clause in Article 35, ultimate home state ownership or control must still be shown.<sup>39</sup> Through the combined effect of Articles 1.4, 1.5 and 35, the Model imposes a very strict connection between the claimant and the home state.

The Model’s shift to an enterprise-based definition has left the question of minority shareholder investors unclear. Traditional BITs usually include shares in the

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<sup>38</sup> See, eg, Hanessian and Duggal (n 11) 217–18.

<sup>39</sup> Tribunals interpreting denial of benefits clauses usually focus on the investor’s *ultimate* ownership: *AMTO v Ukraine* (SCC Case No 080/2005), Final Award, 26 March 2008 [67]; *Ulysseas v Ecuador* (UNCITRAL), Interim Award, 28 September 2010 [170]. However, the presence of a third-country company *anywhere* in the chain of ownership might enable the state to invoke denial of benefits, even with ultimate home state ownership or control: see *Pac Rim Cayman LLC v El Salvador* (ICSID Case No ARB/09/12), Decision on the Respondent’s Jurisdictional Objections, 1 June 2012 [4.79]–[4.82].

definition of investment.<sup>40</sup> Consequently, even investors with minority stakes in local investment vehicles have managed to bring claims.<sup>41</sup> While tribunals have admitted the need to establish a cut-off point of minimum shareholding beyond which minority shareholders' claims would not be permissible (being only remotely connected to the affected company),<sup>42</sup> no claim by a minority shareholder has yet been denied on this ground.

One Indian official has contrasted the Model with other treaties which protect “all kinds of indirect and minority shareholders”, perhaps indicating India’s intention to exclude such claimants.<sup>43</sup> However, the Model appears to contemplate the possibility that an investor might hold less than 50% of the enterprise that represents the investment. First, the definition of “enterprise” in Article 1.3 includes joint ventures, which are necessarily constituted by more than one entity. Second, while the Draft Model defined ownership as a stake of more than 50% in a company, this was removed in the Model following criticism in Report 260.<sup>44</sup>

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<sup>40</sup> D Gaukrodger, ‘Investment Treaties and Shareholder Claims: Analysis of Treaty Practice’ (OECD Working Papers on International Investment, 2014/03) <[www.oecd.org/daf/inv/investment-policy/WP-2014-3.pdf](http://www.oecd.org/daf/inv/investment-policy/WP-2014-3.pdf)>.

<sup>41</sup> See, eg, *CMS Gas Transmission Company v Argentina* (ICSID Case No ARB/01/8), Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003 [47]–[65].

<sup>42</sup> *Enron Corporation and Ponderosa Assets LP v Argentina* (ICSID Case No ARB/01/3), Decision on Jurisdiction, 14 January 2004 [52].

<sup>43</sup> South Centre (n 2) [54].

<sup>44</sup> Report 260 observed that it was anyway illegal for foreigners to own more than 50% of an Indian company, making the draft Model’s definition meaningless: (n 6) [2.2.3]. However, more recent reforms have removed this limit in certain sectors: BBC News, ‘India Overhauls Foreign Ownership Rules’ (20 June 2016) <[www.bbc.com/news/business-36575755](http://www.bbc.com/news/business-36575755)>.

Even if an investment must be wholly-owned by the investor, the Model includes the enterprise's assets, including "shares ... in another enterprise",<sup>45</sup> as part of the investment. There is no stated ownership threshold on these shares, suggesting that the Model would protect an investor's minority stake in a host state company, as long as that stake is held through another wholly-owned host state company (the investment). However, this conclusion might be affected by the Model's express exclusion of "portfolio investments ... in another enterprise" from the protected assets.<sup>46</sup> Although "portfolio investment" is not defined in the Model, it might be taken to be contrasted with "shares" on the grounds that the former does not grant rights of managerial control in a company.<sup>47</sup> A tribunal might also draw from external definitions of "portfolio investment", such as the IMF's indication that the term refers to shareholdings of less than 10%.<sup>48</sup> Thus, there may be a minimum threshold on a minority shareholding that could be protected via a wholly-owned host state company.

The Model's failure to clarify the position of minority shareholders is unfortunate, particularly since foreign investors in India cannot hold majority stakes in local enterprises in many sectors.<sup>49</sup> While a desire to curb treaty-shopping and parallel

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<sup>45</sup> Strangely, under Article 1.3, an enterprise's assets can also include 'shares ... of the enterprise'. Since this is distinguished from 'shares ... in another enterprise', it appears to mean 'shares in the enterprise itself'. However, in many jurisdictions, including India, it is illegal for companies to own shares in themselves: see *Trevor v Whitworth* (1887) 12 App Cas 409; Companies Act 2013 ss67–68 (India); Corporations Act 2011 s259A (Australia). The reference to 'shares ... of the enterprise' is therefore probably meaningless.

<sup>46</sup> Article 1.4(i).

<sup>47</sup> See also R Dolzer and C Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 60.

<sup>48</sup> International Monetary Fund, 'Balance of Payments and International Investment Position Manual' <[www.imf.org/external/pubs/ft/bop/2007/pdf/chap6.pdf](http://www.imf.org/external/pubs/ft/bop/2007/pdf/chap6.pdf)>.

<sup>49</sup> See n 44.

claims appears to have been central to the Model's definitions and denial of benefits clause, similar concerns over multiple claims from minority shareholders have strangely been left unaddressed.<sup>50</sup>

### **3.3 Exhaustion of local remedies**

Exhaustion of local remedies (ELR) is a “well-established rule of customary international law”<sup>51</sup> that renders a claim before an international court inadmissible unless redress has been first sought in the domestic courts of the respondent state.<sup>52</sup> First applied in the context of diplomatic protection,<sup>53</sup> it has since found its way into international human rights law as well.<sup>54</sup> In investment arbitration, however, very few investment treaties require full ELR before commencing arbitration.<sup>55</sup> Some treaties require claimants to pursue local remedies for a specified time-period, usually for a “reasonable time” or for no more than two years.<sup>56</sup> The Model diverges from this practice by imposing a requirement to pursue local remedies for “at least a period of five years” before turning to international arbitration.<sup>57</sup> Although a partial, time-limited

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<sup>50</sup> The undesirable consequences of such claims have been well recognized: see, eg, C McLachlan, L Shore and M Weiniger, *International Investment Arbitration: Substantive Principles* (OUP 2007) ch 4.

<sup>51</sup> *Interhandel (Switzerland v USA)* (Preliminary Objections) [1959] ICJ Rep 6, 27; *Elettronica Sricula SpA (ELSI) (USA v Italy)* [1989] ICJ Rep 15 [50].

<sup>52</sup> ILC (n 29) Article 44(b).

<sup>53</sup> C Amerasinghe, *Local Remedies in International Law* (CUP 2004) 3.

<sup>54</sup> European Convention on Human Rights, Article 35; American Convention on Human Rights, Art 46(1)(a); International Covenant on Civil and Political Rights, Art 41(1)(c).

<sup>55</sup> M Brauch, ‘Exhaustion of Local Remedies in International Investment Law’ (IISD Best Practices Series, January 2017) <[www.iisd.org/sites/default/files/publications/best-practices-exhaustion-local-remedies-law-investment-en.pdf](http://www.iisd.org/sites/default/files/publications/best-practices-exhaustion-local-remedies-law-investment-en.pdf)> 7.

<sup>56</sup> *ibid* 9–11.

<sup>57</sup> Article 15.2.



ELR requirement (as in the Model) is not the same as the customary obligation of *full* exhaustion,<sup>58</sup> it raises several similar issues discussed below, relating to the nature of the remedies that must be pursued, the operation of the “futility” exception, the relation to “fork-in-the-road” clauses, and the interaction with waiver clauses. The Model’s wording leaves all of these issues unclear to different degrees.

First, the Model’s Article 15.1 lays down the rule: an “investor must first submit its claim before the relevant domestic courts or administrative bodies” of the host state. However, the Model does not clarify the nature of administrative bodies to which the claims must be submitted. In international law, administrative remedies have been subject to two opinions. On one more expansive view, administrative remedies can include all remedies available through the executive branch of a government, whether binding or not.<sup>59</sup> More recently, administrative bodies have been understood to mean only those bodies that have a judicial nature and are capable of delivering a binding decision.<sup>60</sup> Although the Model lacks a definition of “administrative bodies”, the definition of “law” in Article 1.6 encompasses all decisions by “administrative institutions having the force of law”. This might indicate India’s intention to subscribe

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<sup>58</sup> See *Ambiente Ufficio SPA v Argentina* (ICSID Case No ARB/08/9), Decision on Jurisdiction and Admissibility, 8 February 2013 [601]–[602]; Brauch (n 55) 2. Recent media discussion of the Indian Model has confused a requirement of full exhaustion with the actual requirement of partial, time-limited exhaustion: see J Hepburn, ‘Indian BIT Negotiator Clarifies Country’s Stance on Exhaustion of Remedies, and Offers Update on Status of Country’s Revamp of Bilateral Investment Treaties’ (*Investment Arbitration Reporter*, 31 March 2017) <[tinyurl.com/mqgnaew](http://tinyurl.com/mqgnaew)>.

<sup>59</sup> L Sohn and R Baxter, *Convention on the International Responsibility of States for Injuries to Aliens* (1961) 164; *Phosphates in Morocco (Italy v France)* (Preliminary Objections) PCIJ Series A/B No 74, 28.

<sup>60</sup> ILC, ‘Draft Articles on Diplomatic Protection with commentaries’ in *Yearbook of the ILC*, 2006, Volume II, A/CN.4/SER.A/2006/Add.1 (Part 2), commentary to Article 39 [5].

to an expanded view of administrative bodies that includes all such bodies, irrespective of their ability to render a binding decision.

Second, as well as limiting the ELR requirement to five years, the Model includes an explicit “futility” exception, which excuses an investor from pursuing local remedies if “there are no available domestic legal remedies capable of reasonably providing any relief”.<sup>61</sup> This exception mirrors the equivalent futility exception to the customary ELR requirement.<sup>62</sup> There is relative agreement on certain ways of satisfying this exception. Considerations such as low possibility of success or difficulty in filing appeals, for instance, are not sufficient.<sup>63</sup> Conversely, ELR can be bypassed if the host State’s Supreme Court decisions prevent its lower courts from deciding the subject of the investor’s complaint.<sup>64</sup> However, in relation to time-limited clauses, there is less agreement on whether the futility exception is satisfied where the dispute is unlikely to be resolved in domestic courts within the timeframe specified. Given that India’s legal system is notoriously slow,<sup>65</sup> investors might be likely to plead this element of the futility exception in *every* claim against India, contending that the domestic system is not capable of reasonably providing any relief within five years. Whether such a claim would succeed to bypass the local remedies requirement depends on the intended interpretation of the exception.

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<sup>61</sup> Article 15.1.

<sup>62</sup> ILC (n 60), Article 15(a).

<sup>63</sup> *ibid*, commentary to Article 15(a) [4].

<sup>64</sup> See *Ambiente*, where decisions of the Argentinian Supreme Court rendered matters associated with Argentina’s sovereign debt restructuring non-justiciable. *Ambiente* (n 58) [616]–[620]. The test is incorporated from ILC (n 60), Article 15(a).

<sup>65</sup> Vidhi Doshi, ‘India’s Long Wait for Justice: 27m Court Cases Trapped in Legal Logjam’ (*The Guardian*, 6 May 2016) <[www.theguardian.com/world/2016/may/05/indias-long-wait-for-justice-27-million-court-cases-trapped-in-a-legal-logjam](http://www.theguardian.com/world/2016/may/05/indias-long-wait-for-justice-27-million-court-cases-trapped-in-a-legal-logjam)>.

Investment tribunals are known to adopt differing approaches to this question. Some tribunals, citing principles of “fairness and efficiency”, have allowed investors to bypass a time-limited ELR requirement if domestic courts cannot reach a *final* decision on substance within the time period.<sup>66</sup> Others acknowledge that time-bound ELR provisions do not require the final disposal of the domestic case, but merely seek to give domestic courts the opportunity to render a *first-instance* judgment.<sup>67</sup> The Model’s use of the phrases “reasonably” and “any relief”, coupled with the unprecedented inclusion of the 5-year time-period, is likely motivated by the problems arising from the former interpretive approach. Studies suggest that Indian High Courts take just over three years on average to issue judgments.<sup>68</sup> If the former interpretation were to apply, investors would succeed in bypassing local remedies for most investment claims against India, as a final disposal of a case, after exhausting all avenues of appeal, within 5 years is unlikely for complex investment disputes.<sup>69</sup> The more obvious interpretation is the latter – that the Model seeks to offer domestic courts the opportunity to resolve the dispute by

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<sup>66</sup> *Abaclat v Argentina* (ICSID Case No ARB/07/5), Decision on Jurisdiction and Admissibility, 4 August 2011 [583]; *Urbaser v Argentina* (ICSID Case No ARB/07/26), Decision on Jurisdiction, 19 December 2012 [194], [202]–[203].

<sup>67</sup> *Ambiente* (n 58) [604]–[605].

<sup>68</sup> P Thakur, ‘HCs Taking 3 Years on Average to Decide Cases: Study’ (*The Times of India*, 22 March 2016) <[timesofindia.indiatimes.com/india/HCs-taking-3-years-on-average-to-decide-cases-Study/articleshow/51503719.cms](http://timesofindia.indiatimes.com/india/HCs-taking-3-years-on-average-to-decide-cases-Study/articleshow/51503719.cms)>. Similarly, average times to enforce contracts in Indian courts have been calculated as 1420 days (3.9 years): World Bank, *Doing Business 2017: Equal Opportunity for All* (World Bank 2017) <[www.doingbusiness.org/reports/global-reports/doing-business-2017](http://www.doingbusiness.org/reports/global-reports/doing-business-2017)>.

<sup>69</sup> *White Industries* (n 4) was based on a nine-year delay by Indian courts to decide an application for set-aside of an ICC award.

delivering a first-instance judgment,<sup>70</sup> with a possibility of a decision on appeal, for which the current 5-year time period seems sufficient.<sup>71</sup>

Third, a strange element of the Model's ELR clause is its provision that "the investor shall not assert that the obligation to exhaust local remedies does not apply or has been met on the basis that the claim under this Treaty is by a different party or in respect of a different cause of action".<sup>72</sup> This provision appears to be a reference to situations such as in *CMS v Argentina*.<sup>73</sup> In that case, the investor's local subsidiary had commenced domestic court proceedings before the investor launched its BIT arbitration. However, the relevant BIT contained a "fork-in-the-road" clause, preventing arbitration from proceeding if the investor had already taken the claim to local courts. Despite this, the tribunal allowed the arbitration to proceed on the grounds that the domestic and international claims were technically brought by different parties and were based on different causes of action.

While apparently aimed at preventing such situations, this provision confuses fork-in-the-road clauses with ELR clauses. The issues in the *CMS* case simply do not arise in relation to ELR requirements. An investor under the Model is highly likely to argue that it has met the ELR requirement by virtue of its subsidiary's local claims and/or by pursuing local remedies under domestic law causes of action; it makes no

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<sup>70</sup> *Interhandel* (n 51) 27; *Ambiente* (n 58) [605].

<sup>71</sup> If full ELR were nevertheless achieved within five years, the natural interpretation of Article 15.2 is that its requirements would be taken to be satisfied when the final remedy (eg, a Supreme Court ruling) was issued. The investor would then be required to institute arbitration within one year of this date, under Article 15.5(ii). cf Hanessian and Duggal (n 11) 222–23.

<sup>72</sup> Article 15.1, second paragraph.

<sup>73</sup> Other commentators have also viewed it this way: Hanessian and Duggal (n 11) 221; Ranjan and Anand (n 11) 42.

sense for the Model to *prevent* an investor from arguing this. It is possible that the provision intends to force the foreign investor specifically, not its locally-established enterprise, to bring the domestic claims, if India means to impose an exceedingly strict ELR requirement. But given that the Model otherwise treats the investor and its investment almost as a unit, including in Article 15.1's futility exception, this interpretation is highly unlikely. More sensible, at least to protect Indian outbound investors, might be a provision preventing *host states* from arguing that the ELR requirement has *not* been met just because a specific allegation of BIT breach was not brought to local courts,<sup>74</sup> or because a local subsidiary, rather than the investor, brought the domestic claims. As currently phrased, however, the Model's provision is inutile.

Fourth, the Model's waiver clause also raises questions, although they are more easily resolved. Article 15.5(iii)–(iv) require that an investor and, where relevant, its enterprise waive their right to “initiate or continue” domestic proceedings before submitting a claim to arbitration. Together with Article 15.1, the Model thus appears both to require investors to initiate domestic proceedings *and* to waive their right to do so. To resolve this apparent contradiction, might it be argued that the waiver overrides the ELR requirement?

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<sup>74</sup> The ICJ in *ELSI* observed that the claimant is not required to present its claim to domestic courts with arguments suited to an international tribunal; instead, ‘it is sufficient if the *essence* of the claim has been brought before the competent [domestic] tribunals’: *ELSI* (n 51) [59]. Article 15.1 already confirms this by requiring investors to submit domestic claims only ‘in respect of the same measure or similar factual matters’ for which a BIT breach is claimed.

The interaction between waiver and ELR requirements has not always been clear.<sup>75</sup> Waiver provisions akin to the Model were first introduced in NAFTA,<sup>76</sup> to prohibit investors from taking a “U-turn” towards domestic remedies after initiating arbitration.<sup>77</sup> NAFTA tribunals have clarified that these waiver provisions become applicable only *after* investors have sought recourse to arbitration. Prior to initiating arbitration, investors under NAFTA are entitled to initiate or continue domestic proceedings, despite a treaty requirement to waive recourse to domestic remedies.<sup>78</sup> The Model’s waiver provision can be read similarly: it applies only *after* the ELR obligation has been met, and it then stops an investor from maintaining simultaneous proceedings before a national court and an arbitral tribunal.<sup>79</sup>

### ***3.4 Dismissal of frivolous claims***

Article 21 adopts an expedited procedure for resolving a State’s preliminary objections, by directing tribunals to decide, within 150 days of receiving a State’s request, any preliminary objection that an investor’s claim is “(a) not within the scope of the

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<sup>75</sup> See the NAFTA jurisprudence discussed in M Kinnear, A Bjorklund and J Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (Kluwer 2006), Article 1121.

<sup>76</sup> NAFTA, Article 1121(1)(b). See also: Canadian Model FIPA, Article 26(1)(e); US Model BIT (2012), Article 26(2)(b).

<sup>77</sup> L Kaplan and J Sharpe in Brown (n 12) 829.

<sup>78</sup> *Waste Management v Mexico* (ICSID Case No ARB(AF)/00/3), Mexico’s Preliminary Objection concerning the Previous Proceedings: Decision of the Tribunal, 26 June 2002 [30]; B Klafter, ‘International Commercial Arbitration as Appellate Review: NAFTA’s Chapter 11, Exhaustion of Local Remedies and Res Judicata’, (2006) 12 UC Davis J Int’l L & Pol’y 409, 415.

<sup>79</sup> *Waste Management* (n 78) [31]. Nevertheless, even on this interpretation, Article 15.5’s reference to waiving rights to ‘initiate’ domestic proceedings will have limited utility, since domestic proceedings were necessarily initiated five years earlier.

Tribunal’s jurisdiction, or (b) manifestly without legal merit or unfounded as a matter of law”.<sup>80</sup> This drafting is curious; it seems to have borrowed from, and combined, standards available in other agreements for dismissing certain preliminary questions.<sup>81</sup> In doing so, the Model has potentially created interpretative challenges.

First, the Model has not explained whether there is a difference in the meaning of the phrases “manifestly without legal merit” and “unfounded as a matter of law”. The former, having its genesis in ICSID Arbitration Rule 41(5), is understood to refer to legal allegations that are frivolous or patently unmeritorious.<sup>82</sup> The latter has been used in the CETA and the EU-Singapore FTA to refer to claims that, as a matter of law, are not claims “for which an award in favour of the claimant may be made”.<sup>83</sup> In the past, investor-claimants have attempted to oppose a tribunal’s jurisdiction to conduct an expedited review, on the grounds that claims for which an award in favour of the claimant cannot be made as a matter of law are limited to “frivolous claims”. Rejecting such arguments, tribunals have interpreted objections on this ground to have a broader scope, covering not just frivolous claims but also claims that are legally unsustainable.<sup>84</sup> Article 21 fails to take note of this distinction, or to prevent overlaps. Instead, by

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<sup>80</sup> Articles 21.1 and 21.4.

<sup>81</sup> CAFTA-DR, Article 10.20.4; CETA, Articles 8.32–8.33; EU-Singapore FTA, Articles 9.20–9.21; ICSID Arbitration Rules, Article 41(5).

<sup>82</sup> *Trans-Global Petroleum v Jordan* (ICSID Case No ARB/07/25), The Tribunal’s Decision on the Respondent’s Objection under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008 [78].

<sup>83</sup> CETA, Article 8.33; EU-Singapore FTA, Article 9.21. This phrase is, in turn, borrowed from the CAFTA-DR, Article 10.20.4.

<sup>84</sup> *Pac Rim* (n 39), Decision on the Respondent’s Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010 [108]; *Renco Group v Peru* (ICSID Case No UNCT/13/1), Decision as to the Scope of the Respondent’s Preliminary Objections under Article 10.20.4, 18 December 2014 [185].

clubbing the two phrases together into a single sub-category, it seems to use them interchangeably. This is regrettable, as the exact scope of the two phrases affects the questions that a tribunal can determine under Article 21's expedited procedure.

Second, the Model does not clarify the extent to which objections concerning the scope of the tribunal's jurisdiction can be made under Article 21.1(a). Ostensibly, the provision covers *any* kind of jurisdictional challenge. However, Article 21 is titled "Dismissal of Frivolous Claims". If the interpretive rule that the ambit of a provision is defined by its title<sup>85</sup> were to be followed, presumably only those jurisdictional challenges that concern the frivolity of an investor's claim will be covered under Article 21. To date, provisions similar to Article 21 have not made a specific reference to jurisdictional objections.

The Model does appear to envisage two different categories of jurisdictional objection. The chapeau of Article 21.1 preserves a tribunal's right to address "*other objections*",<sup>86</sup> while the timetabling provision in Article 21.3 requires tribunals to "establish a schedule for considering the objection consistent with any schedule it has established for considering *any other preliminary question*".<sup>87</sup> Furthermore, the waiver provision in Article 21.5 provides that a respondent is not assumed to have waived *competence*-related objections merely because that objection was not raised under the Article 21 procedure. These provisions might suggest that the scope of Article 21.1(a) is limited to objections that the claim is frivolous on jurisdictional grounds, excluding jurisdictional objections that require more serious consideration.

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<sup>85</sup> R Gardiner, *Treaty Interpretation* (2nd ed, OUP 2015) 200; *Plama v Bulgaria* (ICSID Case ARB/03/24), Decision on Jurisdiction, 8 February 2005 [147].

<sup>86</sup> *Renco* (n 84) [191].

<sup>87</sup> *ibid* [200].



This view is further supported by the fact that, under Article 21.3, tribunals are required to assume the claimant's factual allegations to be true; and that, under Article 21.4, objections raised under Article 21.1(a) have to be resolved on an expedited basis within 150 days. Combined, these provisions indicate that under Article 21 a tribunal is likely to entertain only those jurisdictional objections that do not involve any serious legal or factual analysis and can therefore be resolved on a summary basis. In fact, previous tribunals have refused to entertain objections that raise complex legal and factual issues in a summary proceeding.<sup>88</sup> If this was indeed India's intention, it would have done better to clarify this by perhaps stating that, under Article 21.1(a), a respondent state may object that an investor's claim is "*manifestly* not within the scope of the Tribunal's jurisdiction". India's failure to do so may put tribunals under additional pressure, forcing them to engage in such an interpretative exercise within the already strict 150-day time period for review of Article 21 frivolous claims.

#### **4. Redundancy in Light of Customary and Treaty Obligations**

Section 2 discussed certain of the Model's actual innovations, while Section 3 discussed some apparent innovations that, on closer examination, are weakened by persistent ambiguity on key issues. Nevertheless, these provisions can at least be understood with respect to the international law background. This section discusses other provisions of the Model which appear to do nothing at all, and are simply redundant when seen in light of India's existing customary and treaty obligations.

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<sup>88</sup> *Brandes Investment Partners v Venezuela* (ICSID Case No ARB/08/3) Decision on the Respondent's Objection under Article 41(5) of the ICSID Arbitration Rules, 2 February 2009 [71]; *PNG Sustainable Development v Papua New Guinea* (ICSID Case No. ARB/13/33) Decision on Respondent's Objections under Rule 41(5), 28 October 2014 [92]–[99].

#### ***4.1 Interaction with domestic law***

The Model shows a refreshing acceptance that interaction with domestic law will be inescapably relevant to investment treaty claims despite their international law context. Unlike many investment treaties, the Model's applicable law clause in Article 23.3 explicitly acknowledges that tribunals may apply host state law "for matters relating to domestic law". However, this interaction is muddled by Article 13.5(i), which states that tribunals "shall not have the jurisdiction to review the merits of a decision made by a judicial authority of the Parties".

On its face, the reference to "merits" in Article 13.5(i) is unclear. It may be taken to refer to the merits, tested against *international* law, of a local court's decision on a matter of domestic law. But, if tribunals were barred from reviewing domestic decisions against international legal standards, denial of justice claims under Article 3.1(i) would be impossible. If interpreted this way, Article 13.5(i) would implausibly prevent all claims of treaty breach in relation to domestic judicial decisions. The more obvious interpretation, likely motivated by the desire to "ensure that the tribunal does not sit on appeal over the decisions of Indian Courts",<sup>89</sup> is that the clause prevents tribunals from questioning the correctness of a domestic court's decision on *domestic* law.<sup>90</sup> NAFTA tribunals have expressed a similar desire through protests that they are not "fourth instance" courts of appeal.<sup>91</sup> Although understandable, this interpretation carries its own problems. The effect of Article 13.5(i), on this view, would be that tribunals are *bound* by domestic court decisions on domestic law matters. But situations

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<sup>89</sup> Report 260 (n 6) [5.3.1].

<sup>90</sup> Report 260 appears to take a similar view: *ibid* [5.3.4].

<sup>91</sup> See, eg, *ADF Group Inc v USA* (ICSID Case No ARB(AF)/00/1), Award, 9 January 2003 [190]; *Eli Lilly v Canada* (UNCT/14/2), Final Award, 16 March 2017 [224].

may arise in which the investor might allege that host state courts are not to be trusted. Under the executive's influence, local courts may issue a self-serving ruling that, for instance, a licence was lawfully terminated or that the investor acted illegally. If such problematic rulings are to bind tribunals, the security supposedly provided to the investor by the Model – of international oversight in a neutral forum – is largely lost. A better position, widely acknowledged amongst international courts, would be that, while international adjudicators must pay the utmost regard to domestic court rulings on domestic legal questions, exceptional circumstances may call for departure from this.<sup>92</sup> In any case, findings of a tribunal that “second-guess” the local courts on a domestic law question would not be binding on the host state,<sup>93</sup> leaving the “fourth instance” situation to pose little risk to states.

A third interpretation is also possible, illustrating further problems. India is a “dualist” state, in which breaches of the state's international legal obligations cannot be directly pleaded before Indian courts.<sup>94</sup> However, a partner state signing an investment treaty with India on the basis of the Model may be “monist”, allowing domestic courts (broadly speaking) to rule directly on alleged breaches of treaties binding on those states, without incorporation of the treaty into a domestic statute. In this situation, an Indian investor in such a host state will have possibly already pleaded a breach of the investment treaty before the host state's domestic courts, and will have already lost its case before turning to international arbitration. If Article 13.5(i) binds the tribunal to the

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<sup>92</sup> See, eg, *Helnan v Egypt* (ICSID Case No ARB/05/19) Award, 3 July 2008 [106]; *US – Section 301 Trade Act* (22 December 2009) WT/DS152/R [7.19]; *Kononov v Latvia* App no 36376/04 (ECtHR, 17 May 2010) [189]; *Ahmadou Sadio Diallo (Guinea v Congo)* [2010] ICJ Rep 639 [70] (ICJ).

<sup>93</sup> J Hepburn, *Domestic Law in International Investment Arbitration* (OUP 2017) 133–34.

<sup>94</sup> Constitution of India, Article 253; *Jolly George Vergese v Bank of Cochin*, 1980 AIR 470; *State of West Bengal v Kesoram Industries* (2004) 10 SCC 201.

host state's judicial determination of questions of *international* law – ie, whether the treaty has been breached – then the investor's claim will necessarily fail. This would “render the entire BIT unworkable”.<sup>95</sup>

The best interpretation of Article 13.5(i), then, is to view it as doing no more than (unnecessarily) replicating Articles 15.1 and 26.3, which already confirm that tribunals cannot make any principal findings on domestic law questions,<sup>96</sup> but are restricted to determining whether the treaty itself has been breached – even if incidental findings on domestic law questions are required en route to this principal determination.<sup>97</sup> Seen against the background operation of the international legal system, and the other obligations in the Model itself, Article 13.5(i) is simply redundant.

#### ***4.2 Treaty conflict***

Under Article 34.2, questions regarding the Model's relationship with other treaties are to be resolved by reference to the Vienna Convention on the Law of Treaties (VCLT). As India is not a party to the VCLT, the Model drafters may have felt it necessary to include a provision specifically incorporating those rules to regulate any conflicts or inconsistencies between the Model and other treaties. However, the VCLT rules on

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<sup>95</sup> Report 260 (n 6) [5.3.2]. Report 260 considers a similar issue in relation to a different clause in the draft Model (Article 14.2(ii)(a), which was deleted in the Model), but ignores the possibility of a domestic court ruling on an international law question. The Report surprisingly accepts the Draft Model equivalent to the Model's Article 13.5(i), finding it ‘in consonance with ordinarily accepted tribunal jurisdictions’: *ibid* [5.3.4].

<sup>96</sup> cf JA Rivas in Brown (n 12) 235.

<sup>97</sup> J Hepburn, ‘CETA's New Domestic Law Clause’ (*EJIL:Talk!*, 17 March 2016) <[www.ejiltalk.org/cetas-new-domestic-law-clause/](http://www.ejiltalk.org/cetas-new-domestic-law-clause/)>. On incidental questions, see, eg, *Ampal-American Israel Corp v Egypt* (ICSID Case No ARB/12/11), Decision on Liability and Heads of Loss, 21 February 2017 [81].

treaty conflict reflect CIL.<sup>98</sup> In particular, the VCLT's Article 30(2), and its customary law equivalent, set out a kind of *lex specialis* rule, resolving treaty conflicts by giving effect to any specific intentions of the parties as manifested in a conflict clause in the treaty texts themselves.<sup>99</sup> Even without Article 34.2, the customary rule would already regulate conflicts involving the Model.<sup>100</sup> Application of the rule would draw on the Model's Article 34.1, which contains a treaty conflicts clause establishing that the Model "shall not affect the rights and obligations of the Parties under any other Agreements to which they are parties".<sup>101</sup> An interpreter would thus conclude that any conflicting treaty should prevail over the Model. The presence of Article 34.2 in the Model does not cause any interpretive difficulties, but it adds nothing to the process or outcome of interpretation that would be followed in any case under CIL rules.<sup>102</sup>

#### ***4.3 Burden of proof of international legal obligations***

Article 23.2 presents another instance of apparent redundancy, when measured against CIL requirements and other provisions of the Model. The article confirms the general position under international law that the party making an allegation bears the burden of

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<sup>98</sup> M Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) 410; A Orakhelashvili, 'Article 30' in O Corten and P Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary* (OUP 2011) vol I, 774.

<sup>99</sup> Orakhelashvili (n 98) 764, 774.

<sup>100</sup> Article 23.3 explicitly gives power to tribunals to apply the customary rules of treaty interpretation.

<sup>101</sup> See also Article 32.3.

<sup>102</sup> Report 260 recommended replacing the reference to the VCLT with a reference to 'rules of customary international law': (n 6) [7.1.2]. This recommendation was apparently not accepted, but in any case the recommended clause would be as redundant as the original.

proving that allegation (*actori incumbit probatio*),<sup>103</sup> and unsurprisingly requires the investor to prove jurisdiction, breach, loss and causation. Curiously, though, Article 23.2(b) also requires the investor to prove “the existence of an obligation under Chapter II of this Treaty”. Chapter II sets out the central investment protections offered by the Model. Presumably, an investor can satisfy its burden of proving the existence of a Chapter II obligation simply by pointing to the appropriate treaty clause; while the meaning or interpretation of the obligations might be in dispute, their *existence* is entirely obvious.

Nevertheless, the Model drafters may have had in mind a scenario similar to the *Agility v Pakistan* case.<sup>104</sup> The *Agility* claimants discontinued their case in August 2016, after conceding that they could not prove that the BIT underlying their claims had entered into force.<sup>105</sup> Article 23.2(b) might be taken as a reminder to the investor that it must prove that the obligations claimed to be breached are, in fact, in force and binding on the host state. However, proof of this already forms part of proving jurisdiction, since the tribunal will not have jurisdiction if the underlying investment treaty is not in force. On this reading, the obligation in Article 23.2(b) is redundant, as it is already captured by Article 23.2(a).

Alternatively, the Model drafters may have been thinking of a question raised relatively frequently in disputes under NAFTA and other US-model investment treaties. The NAFTA parties have often maintained, and NAFTA tribunals have often agreed,

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<sup>103</sup> See, eg, C Foster, ‘Burden of Proof in International Courts and Tribunals’ (2010) 29 Australian YBIL 27, 35.

<sup>104</sup> *Agility for Public Warehousing Company KSC v Pakistan* (ICSID Case No ARB/11/8).

<sup>105</sup> LE Peterson, ‘After Obtaining a Jurisdictional Victory in 2013, Investor Later Concedes that Pakistani Investment Treaty is Not in Force and Drops its Arbitration’ (Investment Arbitration Reporter, 11 August 2016) <[tinyurl.com/zmtpjsu](http://tinyurl.com/zmtpjsu)>.

that an investor-claimant must prove that an obligation which it contends to form part of the CIL minimum standard of treatment (MST) in NAFTA Article 1105 does in fact exist as part of that standard.<sup>106</sup> Thus, rather than pertaining to the existence of treaty obligations, Article 23.2(b) perhaps reminds claimants that they need to prove the existence of CIL obligations.<sup>107</sup>

But even this reading of Article 23.2(b) makes little sense. Unlike NAFTA and other US-model treaties, the Model does not refer to the “minimum standard of treatment”. Instead, Article 3.1 establishes an (apparently) *exclusive* list of four obligations that the Model takes to be prohibited by CIL, leaving no scope for an investor argue that other obligations also exist in CIL and are captured by Article 3.1.<sup>108</sup> As such, an investor would have little reason to argue for the existence of any particular customary obligation beyond those codified in Article 3.1.

Article 23.2(b) thus constitutes another redundant provision in the Model, serving more to confuse the reader than to clarify the parties’ respective burdens of proof in investor-state arbitration.

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<sup>106</sup> See, eg, *Glamis Gold v USA* (UNCITRAL) Award, 8 June 2009 [600]–[601]; *Cargill v Mexico* (ICSID Case No ARB(AF)/05/2) Award, 18 September 2009 [273]; *Eli Lilly v Canada* (UNCT/14/2), Submission of the United States of America, 18 March 2016 [16]–[17].

<sup>107</sup> This view is supported in Department of Economic Affairs, Ministry of Finance, Government of India, ‘Consolidated – Interpretative Statements’ <[indiainbusiness.nic.in/newdesign/upload/Consolidated\\_Interpretive-Statement.pdf](http://indiainbusiness.nic.in/newdesign/upload/Consolidated_Interpretive-Statement.pdf)>, footnote 3.

<sup>108</sup> L Johnson, L Sachs and J Coleman, ‘International Investment Agreements, 2014: A Review of Trends and New Approaches’ in A Bjorklund (ed), *Yearbook on International Investment Law & Policy 2014–2015* (OUP 2016) 29.

#### ***4.4 References to the ICSID Convention***

The inclusion of a provision consenting to arbitration at the International Centre for Settlement of Investment Disputes (ICSID) has been a mostly constant feature of India's BITs since the conclusion of its very first treaty with the UK.<sup>109</sup> Despite this, the Draft Model only made provision for arbitration to be conducted under the UNCITRAL Arbitration Rules. Under the Model's Article 16.1(a), India then reverted to offering consent to ICSID arbitration.<sup>110</sup> However, for an ICSID arbitration to proceed, both the respondent state and the home state of the investor-claimant must be parties to the ICSID Convention.<sup>111</sup> Since India is not yet a party, Article 16.1(a) (and its equivalent in most of the earlier treaties) might therefore appear surprising, as it will have no effect until India accedes to the Convention.

This change from the Draft Model to the Model appears to be a result of the LCI's recommendations in Report 260. The Report found the Draft Model's restriction of the dispute resolution chapter to *ad hoc* UNCITRAL arbitration restrictive:

Even though India is not a party to ICSID, reference to these alternate dispute resolution methods might benefit Indian investors abroad seeking to bring a claim against other States. Thus, by limiting the forum for dispute resolution, the 2015 Model might deny available remedies to Indian investors abroad.<sup>112</sup>

The LCI here appears to consider that India's consent to ICSID arbitration in an investment treaty is sufficient to allow Indian nationals to commence arbitration under

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<sup>109</sup> India–UK BIT, Article 9(3)(a).

<sup>110</sup> See also Article 17.2.

<sup>111</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 15, Article 25(1).

<sup>112</sup> Report 260 (n 6) [5.1.2].



the ICSID Convention. But this logic does not hold merit. As mentioned, arbitration under the ICSID Convention is only available to nationals of states that are party to the ICSID Convention,<sup>113</sup> regardless of what arbitration options the state might consent to in an investment treaty. If the Model reverted to India's previous position of consent to ICSID arbitration on the strength of the LCI's recommendation, then, India will be disappointed to discover that the Model's wording will bring no immediate benefits or additional remedies to Indian investors abroad.

Alternatively, if the policy underpinning the inclusion of access to ICSID arbitration is for Indian investors to have recourse to ICSID's institutional facilities, that objective is already met by the Model's inclusion of the option to arbitrate under ICSID's Additional Facility Rules.<sup>114</sup>

Given India's existing treaty commitments, Article 16.1(a) is also presently redundant. Nevertheless, consent to ICSID arbitration in the Model may serve as a hopeful signal to foreign investors that India is still contemplating a future accession to the ICSID Convention. At a practical level, offering consent to ICSID arbitration also avoids the need to amend investment treaties at the time of future accession to the Convention.

## **5. Conclusion**

The problems with the Model identified in this article have significant consequences for the Model's success. As the introduction noted, model BITs are intended to serve (at least) four purposes. Whether the Model is capable of achieving the first three of these

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<sup>113</sup> ICSID Convention (n 111), Article 25(1).

<sup>114</sup> Article 16.1(b). The ICSID adopted these rules for the exact purpose that it could administer arbitrations between parties one of which is not a contracting state or a national of a contracting state to the ICSID Convention.

purposes – facilitating negotiations with partner states, constituting state practice which may contribute to the formation of CIL, and providing interpretive guidance to tribunals – depends on whether its text is clear. Given the criticisms identified particularly in Sections 3 and 4 above, it is doubtful that these three purposes will be met. The Model’s use will only hamper rather than facilitate negotiations if the meaning of its provisions and the intention behind them is not readily discernible. A basic statement of general negotiating positions on various issues is likely to be more useful than a poorly drafted model text. Similarly, unclear drafting and apparently redundant clauses are unlikely to form the basis of consistent state practice, and are also unlikely to provide any interpretive assistance to a tribunal.

Meanwhile, it is still too early to tell whether the Model will serve the fourth purpose of promoting uniformity in international law, since this depends on whether the Model is agreed to by partner states. Although India has reportedly finalized treaties with Brazil and Cambodia partly on the basis of the Model,<sup>115</sup> it is less clear that other states – notably including the United States – will support the Model’s innovations.<sup>116</sup>

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<sup>115</sup> J Dahlquist, ‘Brazil and India Conclude Bilateral Investment Treaty’ (*Investment Arbitration Reporter*, 28 November 2016) <[tinyurl.com/j9ng9o3](http://tinyurl.com/j9ng9o3)>; Press Information Bureau, Government of India, ‘Cabinet Approves Bilateral Investment Treaty between India and Cambodia to Boost Investment’ (27 July 2016) <[pib.nic.in/newsite/PrintRelease.aspx?relid=147849](http://pib.nic.in/newsite/PrintRelease.aspx?relid=147849)>. The treaty with Brazil has not yet been ratified. The treaty with Cambodia has been initialled but not yet signed by either party: Hepburn (n 58).

<sup>116</sup> S Watson, ‘Bumps in the Road for India-US Trade’ (*Livemint*, 15 March 2017) <[www.livemint.com/Opinion/jCOFYtaeoNwunvvYKEx3RO/Bumps-in-the-road-for-IndiaUS-trade.html](http://www.livemint.com/Opinion/jCOFYtaeoNwunvvYKEx3RO/Bumps-in-the-road-for-IndiaUS-trade.html)>; P Sahu, ‘India Fast-Tracks BIT Talks; Cambodia First, US Deal May Take Time’ (*Financial Express*, 21 July 2016) <[www.financialexpress.com/economy/india-fast-tracks-bit-talks-cambodia-first-us-deal-](http://www.financialexpress.com/economy/india-fast-tracks-bit-talks-cambodia-first-us-deal-)

The text's uncertainties and redundancies further complicate the likelihood of partner state agreement. It must thus be questioned whether the Model can achieve any of its goals.

This would not matter if India was preparing to renounce the investment treaty regime and pursue other methods for attracting foreign investment, as states such as South Africa and Indonesia have done. Certainly, economic evidence on the benefits of investment treaties for host states remains mixed.<sup>117</sup> Even while pursuing wholesale termination of BITs, India has reportedly emerged as the fastest growing investment destination in 2016, alongside Prime Minister Narendra Modi's drive to convince foreign corporations to "Make in India".<sup>118</sup> This perhaps suggests little need for BITs to encourage foreign investment in the state. Moreover, the limitations on sovereignty and risk of lawsuits entailed by investment treaties may well outweigh any benefits flowing from the additional protection for outward investors, as critics of the regime contend.<sup>119</sup>

But India remains committed to the regime, and is in fact taking several bold steps to assert a role in the regime's reformation. The Model itself represents an ambitious attempt to re-think the prevailing understanding of what an investment treaty looks like. In some areas, it may have even succeeded at this attempt. Following the

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may-take-time/323831/>; P Ranjan, 'Bit of a Bumpy Ride' (*The Hindu*, 2 June 2016) <[www.thehindu.com/opinion/op-ed/Bit-of-a-bumpy-ride/article14378406.ece](http://www.thehindu.com/opinion/op-ed/Bit-of-a-bumpy-ride/article14378406.ece)>.

<sup>117</sup> UNCTAD, 'The Impact of International Investment Agreements on Foreign Direct Investment: An Overview of Empirical Studies 1998–2014' (IIA Issues Note, September 2014) <[investmentpolicyhub.unctad.org/Upload/Documents/unctad-web-diae-pcb-2014-Sep%2024.pdf](http://investmentpolicyhub.unctad.org/Upload/Documents/unctad-web-diae-pcb-2014-Sep%2024.pdf)>.

<sup>118</sup> S Dave, 'India One of the Fastest Destinations for Investments: KPMG' (*The Economic Times*, 11 March 2017) <[economictimes.indiatimes.com/news/economy/policy/india-one-of-the-fastest-destinations-for-investments-kpmg/articleshow/57595492.cms](http://economictimes.indiatimes.com/news/economy/policy/india-one-of-the-fastest-destinations-for-investments-kpmg/articleshow/57595492.cms)>.

<sup>119</sup> See, eg, M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015).

2016 BIT terminations, India has written to its partner states, and shifted the onus on them to come forward and negotiate new treaties with India.<sup>120</sup> Some partners, such as the UK and Canada, appear keen to do so, at least in principle.<sup>121</sup> At the same time, the country's ever-growing numbers of outward investors have themselves begun to call on BIT protections,<sup>122</sup> and likely form one element of India's continued support for investment treaties. India therefore has reasons to hope that its Model will achieve its objectives. In turn, the Model's failings therefore raise serious concerns about India's ability to effectively renegotiate (terminated and future) BITs to its advantage.

Apart from the instrumental, economic objectives of the Model, its potential to serve other symbolic objectives might also be noted. India presently shows some 'ambivalence about its place in the world'; 'for the most part, [it is] a rule taker in international affairs'.<sup>123</sup> The current re-shaping of international investment law has

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<sup>120</sup> AR Mishra, 'India to Trade Partners: Sign New Bilateral Investment Treaties by 31 March' (*Livemint*, 11 January 2017)

<[www.livemint.com/Politics/8IRq2uiGhDAXjyiO2lEJ3K/India-asks-trade-partners-to-sign-new-BIT-pact.html](http://www.livemint.com/Politics/8IRq2uiGhDAXjyiO2lEJ3K/India-asks-trade-partners-to-sign-new-BIT-pact.html)>.

<sup>121</sup> The UK is reportedly favourable to a (post-Brexit) agreement with India: K Singh and B Ilge, 'India Overhauls its Investment Treaty Regime' (*beyondbrics*, 15 July 2016)

<[blogs.ft.com/beyond-brics/2016/07/15/india-overhauls-its-investment-treaty-regime/](http://blogs.ft.com/beyond-brics/2016/07/15/india-overhauls-its-investment-treaty-regime/)>.

Canada is also seeking an agreement, but reportedly wants concessions on certain elements of the Model: A Sen, 'FinMin to Look Into Changes Sought by Canada in Draft Bilateral Treaty' (*The Hindu BusinessLine*, 26 April 2017)

<[www.thehindubusinessline.com/economy/policy/finmin-to-look-into-changes-sought-by-canada-in-draft-bilateral-treaty/article9665816.ece](http://www.thehindubusinessline.com/economy/policy/finmin-to-look-into-changes-sought-by-canada-in-draft-bilateral-treaty/article9665816.ece)>.

<sup>122</sup> *Flemingo DutyFree Shop Private Ltd v Poland* (UNCITRAL), Award, 12 August 2016; *Indian Metals and Ferro Alloys Ltd v Indonesia* (UNCITRAL) (pending); *Spentex BV v Uzbekistan* (ICSID Case No ARB/13/26), Award, 27 December 2016 (Indian-owned Dutch claimant).

<sup>123</sup> S Chesterman, 'Asia's Ambivalence about International Law and Institutions: Past, Present and Futures' (2017) 27 *EJIL* 945, 969.

presented an opportunity for India to assert a greater role in international law more broadly, if it desires. Its size and growing economic power place it in a position of some (albeit complicated) influence, both regionally and amongst middle-income countries worldwide. India may not have had any such grand, general ambitions of international leadership in releasing the Model; it is more likely a ‘knee-jerk reaction’ to the claims by White Industries and others.<sup>124</sup> But surely, at some level, the episode has encouraged India to think about what it wants from international law and how it wishes to position itself. In this sense, the Model’s flaws reflect a missed opportunity for India in the ‘Asian century’.

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<sup>124</sup> P Ranjan, ‘A BIT of an Overreaction’ (*Financial Express*, 4 April 2015)  
<[www.financialexpress.com/opinion/column-a-bit-of-an-overreaction/60348/](http://www.financialexpress.com/opinion/column-a-bit-of-an-overreaction/60348/)>.